

Date: June 30, 1995

Case No.: 94-CAA-9

In the Matter of

DR. MARGARET DOUGLAS,  
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,  
Respondent.

BEFORE: THEODOR P. von BRAND  
Administrative Law Judge

Appearances:

Helen de Haven, Esq.  
Jacqueline O. Kittrell, Esq.  
For the Complainant

Edward S. Christenbury, Esq.  
Justin M. Schwamm, Sr. Esq.  
Brent R. Marquand, Esq.  
Thomas F. Fine, Esq.  
For the Respondent

## **RECOMMENDED DECISION AND ORDER**

### **Preliminary Statement**

Complainant, Margaret Douglas, on October 19, 1993, filed a complaint under the employee protection sections of six environmental statutes<sup>1</sup> after the Tennessee Valley Authority (hereinafter

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<sup>1</sup>The Clean Air Act, 42 U.S.C. §7622; the Safe Drinking Water Act, 42 U.S.C. §300j-9; the Solid Waste Disposal Act, 42 U.S.C. §6971; the Water Pollution Control Act, 33 U.S.C.

referred to as TVA), Respondent, refused to hire her. On February 18, 1994, the District Director of the Wage-Hour Division found Complainant's charges sustained. Respondent filed a timely appeal and the hearing in this proceeding was held on September 12-15, 1994 in Knoxville, Tennessee<sup>2</sup>.

### **Identity and Background of the Parties**

#### **Complainant**

1. Complainant Margaret Douglas is a forty-three year old resident of Yellow Springs, Ohio. She has earned a B.A., two Masters degrees and a Ph.D. in agriculture economics with a concentration in environmental economics (Douglas 35-6). Complainant is highly skilled in the area of contingent valuation, an econometrics methodology wherein one is able to assign an estimated cost to something that does not have a market value - i.e. the cost of clean water (Douglas 36).

#### **Respondent**

2. Respondent Tennessee Valley Authority (TVA) is a wholly owned corporation of the federal government created pursuant to the Tennessee Valley Authority Act of 1933 to control floods and navigation on the Tennessee River and its tributaries and to generate electricity for distribution throughout the Tennessee Valley region (See Complainant's brief at 6).

#### **Complainant's employment at the City of Knoxville**

3. In January, 1991, Complainant, along with TVA employee Roosevelt Allen, piloted a household hazardous waste collection program funded by TVA. After the plan was adopted, Complainant went to work for Mr. Allen at TVA on a consulting contract. In June, 1991, Complainant was hired as a permanent TVA employee (Douglas 44-6). Complainant received written confirmation of this job offer in May, 1991 (Douglas 46; CX-127). Complainant's position at TVA was classified as a senior economist, SC4, Step 3. (Douglas 47).

4. The Mayor of Knoxville, Victor Ashe, asked Complainant and Roosevelt Allen to make recommendations regarding the City's Solid Waste Plan. Both she and Mr. Allen became part

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§1367; the Superfund law, 42 U.S.C. §9610; and the Toxic Substances Control Act, 15 U.S.C. §2622.

<sup>2</sup>The following abbreviations will be used as citations to the record:

RX - Employer's Exhibit

CX - Complainant's Exhibit

Tr. - Transcript (For purposes of clarity, all citations to the record are labeled by the testifying witness's name. All citations to colloquy on the record are labeled by the denotation "Tr.")

of the Citizens Task Force. The recommendations of the Task Force were passed by the City of Knoxville (hereinafter referred to as the City) in the spring of 1992 (Douglas 49-50).

5. Part of the Task Force's recommendation included the suggestion that a new department be set up at the City to manage solid waste. The City's public services director, Laurens Tullock approached Complainant in June, 1992, and asked whether she would be interested in heading up this office (Douglas 53). She agreed and was hired as the manager of the Office of Solid Waste for the City of Knoxville (Douglas 54). Complainant's job was to ensure that Knoxville had the most environmentally and economically efficient programs, and that those programs were in compliance with local, state and federal law (Douglas 55). She was in charge of all City collection, disposal and waste reduction programs (Douglas 54).

6. As part of the City's waste reduction program, Complainant was responsible for overseeing the City's composting project which was contracted out to Compost Corporation of America (hereinafter referred to as CCA) (Douglas 55). This venture involved an agreement that the City would pay CCA \$20 per ton for all incoming yard waste to produce compost which would later be sold or distributed locally (Douglas 57).

### **Complainant's environmental concerns**

7. CCA was subject to Rule 1200-1-7-.02(1)(c), promulgated under the authority of the State of Tennessee's Solid Waste Disposal Act, TCA 58-211-101 *et seq.* which required them to operate under a permit by rule (Douglas 55; CX-92). The Act states that under no circumstances shall the commissioner issue a permit for an activity which would cause a condition of pollution either by itself or in combination with others. In addition the permits shall include:

The most stringent effluent limitations and schedules of compliance either promulgated by the board, required to implement any applicable water quality standards, necessary to comply with an areawide waste treatment plan, or necessary to comply with other state or federal laws or regulations. Tenn. Code Ann. @ 69-3-108(e)(1)(1994).

8. On August 24, 1992, Complainant sent a memo to her then-supervisor, Laurens Tullock. The memo indicated that CCA was not in compliance with their contract with the City for several reasons and requested advice regarding what action should be taken to address this problem. Tullock responded with several suggestions including termination of the contract if compliance was not forthcoming (CX-94).

9. On February 10, 1993, Complainant sent a memo to her new supervisor, Director of Public Services, Bob Whetsel, advising him that due to her concern of public health risk, the City should cease delivering yard waste to the mulch site until corrective actions could be taken (CX-95). Again, on March 8, 1993, Complainant sent a memo to Bob Whetsel informing him that CCA's failure to properly execute the contract provisions was resulting in a) an uneven distribution of heat to kill

pathogens b) putrification and mold; c) possible hydrogen sulfide gases and d) odor. Complainant stated "[W]e have an obligation to the public to operate an environmentally safe and technically sound yard waste composting operation" (CX-96).

10. In March, 1993, an apartment complex received a notice of violation related to the mulch odor issued by the Knox County Air Pollution Control (CX-112). The mulch was obtained from CCA. In April, 1993, CCA was cited for water quality violations as a result of testing performed by the state water quality regulator, John West (Douglas 58, 61; CX-149). Complainant was advised by Mr. West of the citation (Douglas 61).

11. The site on which CCA was built was part of the state Superfund priority list in conjunction with CERCLA. It contained a high level of heavy metals including lead, cadmium, and other toxic metals (Douglas 66-7).

12. In a memo dated April 19, 1993, addressed to Bob Whetsel, Complainant wrote the following:

As I have consistently stated to you earlier, the contractor, Compost Corporation of America (CCA), is in violation of the City's contract because CCA has failed to process and market the yard waste that the City pays CCA to compost. As you also know, CCA has violated air and water quality regulations as specified by Knox County Air Pollution Control and the State of Tennessee Department of Health and Environment. It continues to be my recommendation that we terminate the contract with CCA and re-bid the contract so that we can find a suitable site to compost the City's 30,000 tons of annual yard waste and find a competent contractor to perform the services (CX-99).

13. On June 17, 1993, Complainant attended a meeting with CCA counsel Senator Budd Gilbert, officials from the Knoxville Utilities Board (hereinafter referred to as KUB), John West of the state water quality office, and state solid waste regulators Jack Crabtree and Rick Sawyer (Douglas 64). At the meeting, it was learned that KUB had conducted several tests that showed high levels of fecal coliform in the compost. In addition, the site was experiencing water quality problems and a test for heavy metals in the area revealed concentrations of lead, cadmium and other toxic metals high enough to require Superfund cleanup (Douglas 65-6).

14. After the meeting, Complainant met with Mr. Whetsel regarding her concerns with CCA's operation (Douglas 68). She also submitted a memo recommending that the City suspend delivery of mulch to the site based on environmental and other considerations (CX-101). Her memo specifically addressed the possibility that CCA was operating on a Superfund site and, if it were a Superfund site, the City had a "responsibility to make a public disclosure and follow state procedures for containment or remediation" (CX-101, p. 2). Complainant was concerned with making this issue

public. Her memo stated:

It appears to me that the attitudes of Mayor Ashe, Randy Vineyard and you imply that we should not disclose the nature of our problems or that our problems do not really pose a health threat. The fact that we have positive tests on fecal coliform, e. coli, and heavy metals leads me to believe otherwise. I would like to know from you at what point, if ever, do you think it would be necessary for the City to close the current composting operation and notify the public of the health risks. (CX-101, p. 2).

15. Approximately two days later, Senator Budd Gilbert called a meeting with the Mayor, the Mayor's spokesperson Mike Cohen, the finance director Randy Vineyard, Mr. Whetsel and Complainant to discuss problems at the site (Douglas 69). At the meeting it was determined that nothing would be said to the public (Douglas 71). Mr. Whetsel told Complainant that if she wanted to keep her job, she would support the Mayor's decision (Douglas 71).

16. Between July 1, 1993, and July 9, 1993, Complainant acted as the designated spokesperson on the compost issue at the request of the City (Douglas 78). The compost issue received a lot of press in the local media. Newspaper accounts documented environmental issues raised by Complainant, including her request for an independent investigation by the EPA (CX-31-54).

17. On July 9, 1993, another meeting was held at which it was determined that CCA would turn one pile of mulch often in an effort to kill all the contaminants. Sales would be made from that pile only and the City would say that that particular pile was safe (Douglas 73). Complainant did not feel confident that the mulch was safe. At that point, she called the Environmental Protection Agency, region IV in Atlanta and requested that independent testing be done (Douglas 75).

18. When asked for comment by News Sentinel reporter Betsy Kauffman as to the safety of the mulch, Complainant indicated that while she didn't think there was cause for panic, there was cause for concern. Complainant called for an independent investigation, i.e. by the EPA. (Douglas 79; CX-35). EPA sludge regulator, Vince Miller indicated that he would do testing at the CCA site if the state of Tennessee requested it (Douglas 75).

### **Complainant's termination by the City of Knoxville**

19. On July 12, 1993, Mr. Whetsel informed Complainant that she was no longer authorized to speak to the press on behalf of the City (Douglas 80). He formally reprimanded her for disagreeing with the state and local officials who said that the mulch was safe.

20. Complainant's former supervisor Laurens Tullock called a meeting on July 14, 1993, at which it was determined that CCA's contract would be cancelled without cause (Douglas 82).

Complainant was asked to stop talking about the project. It was her belief that the issue was resolved; however, she learned the next day that the City had decided not to cancel the contract (Douglas 83).

21. Mr. Whetsel called a meeting with Complainant on July 15, 1993 at which time he terminated her for failing to follow the chain of command (Douglas 84-5; CX-79).

### **TVA Employee Roosevelt Allen's involvement in the compost controversy**

22. Complainant shared her environmental concerns regarding CCA's operation of the compost site with her friend and former colleague, Roosevelt Allen (Allen 454). Mr. Allen had been involved in the development of the City's solid waste plan (Allen 449). After Complainant was terminated, the City called Mr. Allen and asked if he could recommend an expert to make an objective evaluation of the operation (Allen 456). Although there weren't any experts *per se* available, Mr. Allen did forward the names of several qualified people to the City (Allen 456).

23. In a July 26, 1993 letter to TVA's Senior Vice President of Economic Development Betsy Child, Mayor Ashe and his press secretary, Mr. Cohen, officially asked Mr. Allen to come evaluate the site with a yard waste composting specialist (Allen 458). Mr. Allen complied with the mayor's request to assist the City in overcoming public concern regarding the potential health problems associated with the site as well as with Complainant's termination (Allen 460).

### **Complainant's dealings with TVA**

#### **Positions at issue: 1) Manager Sustainable development, and 2) Manager Program and Project Appraisal**

24. After her termination, Complainant went to Mr. Allen to request a job at TVA (Douglas 88). Mr. Allen had recommended Complainant to TVA's Senior Environmentalist, Larry Moss (Allen 467). Complainant received a call from Mr. Moss on or about July 21, 1993 (Douglas 91). Mr. Moss had learned that Complainant had been terminated from her job with the City in the newspaper (Moss 273). As she was presumably available, Mr. Moss called Complainant to discuss her interest in working for TVA (Moss 273-4).

25. On the same date, Complainant was sent a letter from Z. B. Yow-Young, Vice President of TVA's Human Resources Group (CX-128). The letter outlined TVA's selection process. In conclusion, the letter stated the following: "Each Vice President (Mr. Moss was a Vice President) will then meet with the candidates for positions in their organization and ultimately make the selection decisions" (CX-128, p. 2).

26. Complainant interviewed with Moss shortly after his initial call for the positions of Manager of Program and Project Appraisal and Manager of Sustainable Development (Douglas 91). Moss indicated that she was particularly qualified for one of the programs, Manager of Program and Project Appraisal because of her experience in contingent valuation (Douglas 91). The record

reflects that because she was so well qualified for the position of Manager of Program and Project appraisal that Mr. Moss did not continue to consider her for the position of Manager of Sustainable Development.

27. During this initial interview, Complainant apprised Mr. Moss of her legal situation with regard to the City and asked whether it would be an impediment to her serving in a job at TVA (Douglas 92). Moss replied that any concern was limited to her ability to devote time to TVA "but not at all with respect to the fact of her being in a dispute with the City . . . ." (Moss 282).

28. Mr. Moss asked Complainant to take an assessment test (Douglas 91). He also asked her to sit in on a meeting with his other managers on July 23 (Douglas 93). Complainant agreed. At the meeting Mr. Moss asked her to draft a proposed vision for the Sustainable Development and Program and Project Appraisal Programs which she also did (Douglas 94).

29. Complainant took the assessment test on August 2, 1993 (Douglas 95). She did well overall and was especially strong in team building activities (Moss 285). Complainant was so strong in consensus building that the assessment test did not have the opportunity to evaluate her confrontational skills (Moss 285). She was borderline negative in certain of the analytical reasoning and problem solving skill tests, falling just above the median of all college graduates (Moss 286). Mr. Moss acknowledged that this could have been the result of her being given that part of the test at the end of a long day (Moss 286). In any event, the results were not considered disqualifying.

30. On August 3, Mr. Moss called Complainant to tell her that the results of her assessment test were good and that he wanted to offer her a job. He asked her to meet with him that day. At the meeting Mr. Moss offered Complainant permanent, full time employment with full benefits. Her salary was to be \$75,000 per year and she was scheduled to start August 16, 1993. Mr. Moss also told Complainant that she needed to get her problems with the City behind her as soon as possible (Douglas 96-7).

31. On the same day, Mr. Moss called his immediate supervisor, Chief Administrative Officer at TVA, Norman Zigrossi (Zigrossi 531). Mr. Moss informed Mr. Zigrossi via voice mail that he had extended an offer of employment to Complainant and that if Mr. Zigrossi had any problems or concerns regarding either Complainant or her controversy with the City, that they should speak about it as soon as possible (Moss 288).

32. The next day, Mr. Zigrossi called Mr. Moss and told him that he did have a problem with Complainant (Moss 289). Although he did not know the specifics, Mr. Zigrossi was aware that she was involved in the compost controversy from reading the papers (Zigrossi 569).

33. Shortly after Mr. Zigrossi's call, Mr. Moss met with him to discuss his concerns (Moss 289). Mr. Moss interpreted Mr. Zigrossi's concerns to be the following:

1) . . . . he felt that the simple fact of her (Complainant) being in a

public controversy with the city over this solid waste disposal issue meant that she lacked the political skills to handle the situation in a more diplomatic way without it blowing up into a big public controversy ; and 2) . . . she was in a public controversy with the city and if TVA hired her right away for a senior management position - - indeed, hired her while she was in the controversy with the city that some people might interpret that as TVA taking sides, a TVA slap in the face of the city (Moss 289-90).

34. Mr. Zigrossi testified that he was concerned about 1) Complainant's technical competence and 2) his perception that the controversy had created a media event which was politically explosive (CX-155, Zigrossi deposition at 65). He further explained that "it was obvious to me that there was (sic) two sides of the issue, and somebody was going to be right and somebody was going to be wrong." He considered the situation politically explosive for whomever was involved in the controversy (CX-155, Zigrossi Deposition at 65).

35. Mr. Moss met with Mr. Zigrossi again and raised the possibility of hiring Complainant under a personal services contract (Moss 293). Mr. Zigrossi did not agree with Mr. Moss that his suggestion was an acceptable alternative. He did say that it was a possibility, provided Complainant was agreeable (CX-155, Zigrossi Deposition at 69). Mr. Moss testified that after this conversation he thought there was a "better than 50/50 chance" that Mr. Zigrossi would approve it , but that he said he still wanted to "touch some bases" which Mr. Moss took to mean he wanted to speak to people in parallel or higher positions within TVA whom he felt might be concerned about hiring Complainant (Moss 298).

36. After his conversation with Mr. Zigrossi, Mr. Moss called Complainant on August 6 to advise her that there were some concerns at TVA about hiring her due to her controversy with the City (Douglas 98; Moss 293, 299). Mr. Moss suggested the possibility of a one-year personal services contract for the same position she was originally offered with the same compensation. Benefits would be paid as part of her salary (Douglas 98). Although she did not like it, Complainant agreed to accept the contract (Douglas 98).

37. At the time Complainant agreed to accept the one-year personal services contract, she was in her attorneys' office. Her attorneys had just come up with a settlement which was agreeable to all concerned and they made plans to sign it the next week (Douglas 99). The signing of the settlement was scheduled for August 10, 1993 (Douglas 100). Complainant told her attorneys prior to signing that Mr. Moss "definitely told me I had a contract and my starting date is the 16th, so we can proceed" (Douglas 100). As a cautionary measure she decided to call Mr. Moss and confirm her belief (Douglas 100). Mr. Moss was not in his office. His secretary, Charlotte Gaylon informed Complainant that Mr. Moss had signed the contract and sent it on to be processed (Douglas 100; Gaylon 831).

38. Ms. Gaylon further testified that she called Joyce Barnes, assistant to Mr. Zigrossi,

who informed her that Mr. Zigrossi had not signed the contract (Gaylon 832). Ms. Gaylon said she told Complainant that Mr. Zigrossi had not yet signed the contract (Gaylon 833). In addition, a memo allegedly authored by Ms. Gaylon stated that she "advised her (Complainant) that Mr. Moss had no authority to approve the contract unless Mr. Zigrossi signed it and that the final authority rested with him" (Douglas 201). Complainant disagrees with Ms. Gaylon's memo in that she testified that Ms. Gaylon never told her that Mr. Zigrossi had to approve the contract (Douglas 201-2).

39. Complainant signed the settlement with the City on August 10, 1993 (CX-77). The City reinstated her pursuant to the agreement and, believing that her employment with TVA was assured, Complainant submitted her resignation that same day (Douglas 102; CX-80). At the press conference immediately following, Complainant announced that she was going to work for TVA (Douglas 103; CX-79).

40. On August 11, 1993, Mr. Moss returned Complainant's call from the day before. Complainant told him she had settled with the City and was ready to report for work the following Monday (Douglas 104). Mr. Moss told her that Mr. Zigrossi was holding up her contract but that "... Norm just had to talk to one more key person and that he knew he could get back to me within a week with a positive answer" (Douglas 104).

41. Mr. Moss called Complainant on August 20 and said that he was still trying to get Mr. Zigrossi to sign the contract and he would get back to her within one more week (Douglas 105).

42. On August 27, Mr. Moss called again and left the following message on Complainant's answering machine:

Hi Peggy. It's Larry Moss at TVA. Telephone 632-6947. It's Friday, 2:02 p.m. I spoke to Norm. He thinks he should be able to resolve this by the end of next week. He still has to talk to one key person. So I'm still hopeful, but I'm sorry about the delay. I hope to have some news for you by the end of next week. Thanks. Bye. (Douglas 317).

43. Mr. Zigrossi testified that he did not recall ever telling Mr. Moss that there was anyone at TVA that he needed to speak with prior to making a decision regarding Complainant's employment status (Zigrossi 596, 599).

44. Mr. Zigrossi continuously put off making a decision regarding Complainant (Zigrossi 641; CX-155, Zigrossi deposition at 76; Moss 310). Mr. Zigrossi himself testified that he never did clearly communicate to Mr. Moss his intent not to hire Complainant, or in fact anyone, for the position of Manager of Program and Project Appraisal (Zigrossi 640).

45. Mr. Moss had remarked in his notes dated October 13, 1993, that he intended to tell Mr. Zigrossi that a decision had to be made regarding Complainant's potential employment with TVA

(Moss 324). On that date, Mr. Moss learned that a decision had been made to contest Complainant's position. Up to that point, Mr. Moss felt that the question of hiring Complainant was still open (Moss 325).

#### **Complainant's attorney Mr. Anderson's contact with TVA**

46. After the settlement with the City, Complainant's attorney, Bruce Anderson, called Mr. Moss to assure him that the controversy was resolved. Anderson testified that Mr. Moss explained that he had no problem with hiring Complainant, but that there were some concerns about others at TVA, including Mr. Zigrossi, who felt that they should wait to hire Complainant (Anderson 399).

47. Mr. Anderson also spoke with Mr. Zigrossi around August 19 or 20 (Anderson 402). Mr. Anderson testified that Mr. Zigrossi "did not indicate that there was any problem and, eventually, (sic) going ahead and finalizing the deal with Peggy " (Anderson 401). Mr. Zigrossi, testified that he told Mr. Anderson that no decision had been made as to whether or not Complainant was going to be hired (Zigrossi 600). Complainant testified Mr. Anderson told her that Mr. Zigrossi fully intended to let her contract go through but that he just wanted to let the controversy die down a bit (Douglas 107).

#### **Discussions which involved TVA Chairman Craven Crowell**

48. Mr. Moss testified that several weeks after Complainant had settled her suit with the City, Mr. Zigrossi told him that he had had a brief discussion with TVA Chairman Craven Crowell (Moss 298, 311). Mr. Crowell asked Mr. Zigrossi whether TVA knew if hiring Complainant would be a problem with the City (Moss 311). Mr. Zigrossi did not know if it would be a problem, but it had been decided that he was not going to ask anyone within the City to find out. Mr. Crowell agreed that asking would not be appropriate and the discussion was concluded (Moss 311).

49. Mr. Zigrossi testified that he never discussed extending a personal services contract to Complainant with Chairman Crowell (Zigrossi 641).

50. In a deposition dated July 8, 1994, Chairman Crowell stated that he only spoke to Mr. Zigrossi regarding Complainant after she filed suit. He indicated that he mentioned it in passing, but otherwise, avoided the topic absolutely (CX-156, Crowell deposition at 56).

51. As chairman of Respondent TVA, Mr. Crowell is a party to this action. At the hearing on September 12, 1994, Chairman Crowell was ordered to appear and give testimony. In violation of that order, Mr. Crowell failed to appear. Had he appeared, his testimony would have been restricted to the "limited issue of his views as to Mr. Moss" (Tr. at 11; *see also* 162-3). Because Complainant did not have the benefit of Mr. Crowell's testimony at the hearing, Mr. Moss' testimony is found to be credible with regard to all matters pertaining to Mr. Crowell.

**Correspondence between Complainant and TVA**

52. On September 17, 1993, Complainant sent a letter to Mr. Moss asking him to clarify TVA's position on her contract for personal services (CX-9). Complainant requested that Mr. Moss respond to her in writing by September 30, 1993. Mr. Moss immediately brought Complainant's letter to Mr. Zigrossi's attention (Moss 320). Mr. Moss had also drafted a response which Mr. Zigrossi turned over to TVA's legal department. The response, drafted by the legal department, apologized for any misunderstanding regarding the possibility of Complainant's employment with TVA (CX-5). The letter further stated that

I thought it was clear that any arrangements for you to work with TVA were contingent upon further approvals within TVA, and your letter reflects that you were aware of this requirement.

TVA has not yet made a final determination about this matter but will inform you of its decision in the near future (CX-5).

53. It was a normal practice for Mr. Zigrossi to screen Mr. Moss' letters to job candidates before they were sent out (Zigrossi 608).

54. On October 22, 1993, Mr. Zigrossi sent a letter to Complainant again regretting any misunderstanding about the possibility of her employment by TVA (CX-8). Mr. Zigrossi outlined several changes that had taken place at TVA in recent months. He informed her that he would be reviewing the Resource Group's employment needs and that "[W]hen this review process is completed, I will be in a position to make a decision as to whether TVA will be able to utilize your services, and I will let you know my decision at that time" (CX-8). Mr. Zigrossi never contacted Complainant again (Zigrossi 700). Unbeknownst to him at the time, Complainant filed a complaint with the Department of Labor's Wage and Hour division on October 19, 1993 (RX-20, p. 3-10).

**TVA's Candidate Selection Model used by Norman Zigrossi**

55. Norman Zigrossi became the President of the Resource Group in April, 1992 (Zigrossi 533). The Resource Group was that part of TVA which handled appropriated funds from Congress (Zigrossi 624). Mr. Zigrossi's goal was to establish an organization that was responsive and would fulfill TVA's mandate to be an environmental leader (Zigrossi 623). He hoped the organization would become world class (Zigrossi 541).

56. Mr. Zigrossi gave his vice presidents some latitude to determine how they were going to structure their organizations to achieve their goals (Zigrossi 542). Vice presidents were instructed to submit a business plan based upon a model which was adopted by the organization (Zigrossi 543). When it was determined that a position needed to be created or filled, vice presidents were instructed to post jobs and follow the selection process as it was established for the Resource Group (Zigrossi 544).

57. The process began with the vice presidents who would identify positions which needed to be created or filled. If the position fell within the business plan as described and discussed with Mr. Zigrossi, Ms. Headrick of the human resources division would prepare a vacancy announcement (Headrick 720). Interior candidates would have the opportunity to apply and be considered before the process was opened to outside candidates (Kudisch 915). Applicants would be screened to be sure that they met minimal qualification standards for the position (Headrick 720). This technical screen was conducted based on the job description and the qualifications required for the position as well as identified managerial criteria (Headrick 726). Prescreens were conducted for internal TVA candidates only (Kudisch 927). Should a candidate be rejected at this stage, his application would be re-examined by a different person so that the rejection could be said to be reliable (Headrick 727; Kudisch 938). Additional information could be requested of an applicant at this point (Kudisch 917).

58. The next step in the process was a managerial prescreen that was developed by the Tennessee Assessment Center (Headrick 728). The results were used to determine whether a candidate should be permitted to proceed to the Assessment Center, itself (Headrick 729).

59. For those having attended the full Assessment Center, the final stage in the selection process consisted of an interview with the selecting manager (Headrick 729). If the selecting manager determined that hiring a candidate was appropriate, they would work with the vice president of human resources in the Resource Group to determine a salary (Headrick 730). At that point, they would go to Mr. Zigrossi with a list of qualified candidates and a recommendation (Headrick 730). The vice president would outline the differences in particular candidates' qualifications for the position so that Mr. Zigrossi would be able to see why the recommended candidate was the best choice for the job (Headrick 730). Mr. Zigrossi had final approval of offers before they were extended (Headrick 741).

60. Mr. Moss was aware that Mr. Zigrossi required vice-presidents to discuss their candidate choices with him (Moss 266). However, Mr. Moss interpreted that requirement to be for purposes of gaining additional information about a particular candidate, not for purposes of ultimate approval (Moss 267).

61. To hire an employee under Mr. Zigrossi, a vice president was required to present more than one candidate for consideration (Zigrossi 575). Mr. Moss testified that Mr. Zigrossi was of the opinion that, generally speaking, an organization is never dependent upon hiring any one person because there are always others as or more qualified for the position (Moss 296). It was Mr. Zigrossi's policy to refuse to hire a person if they were the only qualified candidate presented, regardless of circumstance (Zigrossi 582, 602, 634, 637).

### **TVA Policy With Regard to Personal Services Contracts**

62. Prior to October, 1993, Mr. Zigrossi was responsible for approving personal services contracts for the Resource Group (Sanders 837). As of October 1, 1993, Tom Sanders, TVA's then-Vice President of Finance and Contracts for the Resource Group became responsible for signing

personal services contracts between \$0 and \$100,000 (Sanders 840). Mr. Zigrossi remained responsible for approving contracts for amounts over \$100,000 (Sanders 840-1).

63. Mr. Zigrossi testified that it was his perception that TVA's new Board of Directors were philosophically opposed to personal services contracts (Zigrossi 641). He believed that the Board wanted to reduce and possibly eliminate outside contracting (Zigrossi 648).

64. Complainant's proposed contract for personal services was in the amount of \$79,000 (RX-5). Had the request been submitted after October, 1993, Mr. Moss would have been responsible for determining the technical competence of the contractee (Sanders 857-8). Mr. Sanders would have been responsible for ensuring that there were no services within TVA that could have performed the requested function at a competitive rate (Sanders 858). Those two criteria having been met, Mr. Sanders would have approved the request for contract language and, if it met the contracting requirements, the transaction would have been complete (Sanders 858).

### **The TVA Budget**

65. All TVA vice presidents under Mr. Zigrossi were charged with developing an environmental management plan that would restructure each organization to meet TVA's environmental goals (Zigrossi 561). The process, which included development of a budget for fiscal year 1994, began in January, 1993 and continued throughout early fall (Zigrossi 561).

66. During the time Mr. Moss was developing his budget, Mr. Zigrossi did not restrict his plans because he did not want to "stifle his imagination or his ability to do his job" (Zigrossi 569). Mr. Zigrossi supported Mr. Moss' efforts (Zigrossi 569).

67. Mr. Moss proposed a budget of \$5.5 million in August, 1993 (CX-4, p. 29). Mr. Moss' organization had received approximately \$3 million for fiscal year 1993 (CX-4, p. 29). Chief Financial Officer, Bill Malac, rejected Mr. Moss' request (Zigrossi 645).

68. All vice presidents submitted higher budgets than they were ultimately awarded (Zigrossi 646). Mr. Zigrossi and his financial advisor, Tom Sanders, discussed the budget situation on October 11, 1993, after Mr. Malac had rejected the vice presidents' requests (Zigrossi 646). On October 12, 1993, Mr. Zigrossi met with the vice presidents and informed them of their budget awards (Zigrossi 647). Mr. Moss' budget was cut to \$2.8 million (Moss 329).

69. Mr. Moss asked Mr. Zigrossi to request approval for additional funds from TVA's Board of Directors (Moss 330; Zigrossi 655). Mr. Zigrossi agreed to speak to Craven Crowell and, if necessary, the full Board (Moss 330). To Mr. Sander's knowledge, a request to the Board for additional funds was never made (Sanders 850). Further funds were not forthcoming (Zigrossi 655).

70. As a result of these budget cuts, a number of planned positions were not filled (Zigrossi 647).

71. The budget cuts also impacted on TVA's hiring practices as to contract employees (Zigrossi 648). The new Board of Directors implemented a transition program to attempt to relocate current TVA employees whose positions were going to be eliminated (Zigrossi 648). As a result, TVA was attempting to reduce and possibly eliminate outside contracting (Zigrossi 648).

72. Mr. Zigrossi testified that at the time Complainant was initially presented as a candidate for either a management position or the one-year personal services contract, money was available to fund the position (Zigrossi 618).

### **Complainant's dealings with TVA**

#### **Position at issue: Position in Community Partnerships**

73. Complainant is a personal friend of TVA Manager for Community Infrastructure Services, Roosevelt Allen (Allen 442, 458). He was also her boss at TVA from 1990-92 (Allen 443; Douglas 45).

74. Mr. Allen was involved in the development of the City's solid waste plant (Allen 449). Complainant discussed the problems the City was having with CCA in July, 1993 (Allen 453). He was surprised to learn of her termination (Allen 455).

75. Complainant spoke with Mr. Allen around July 20, 1993, regarding possible employment at TVA (Douglas 88). Mr. Allen informed her that he had a job in mind that she might be interested in (Douglas 88). The job had not yet been posted internally, however, Mr. Allen told Complainant that he would talk to her about the position if an internal search for qualified candidates was unsuccessful (Douglas 89).

76. Mr. Allen also recommended Complainant to Mr. Moss for the positions of Manager of Sustainable Development and Manager of Program and Project Appraisal (Allen 466-7). Complainant met with Mr. Moss and, thereafter, informed Mr. Allen that she had been offered a position (Allen 468).

77. Later, Mr. Allen saw Complainant and she told him that she was still unemployed. Mr. Allen was surprised, as he thought she would have been working for TVA by then (Allen 470). Mr. Allen asked Mr. Moss why Complainant's contract had been held up. Mr. Moss told him that there were still some internal discussions going on, but that he was hopeful things would work out (Allen 471).

78. In late October, Mr. Allen spoke with Complainant about an Environmental Scientist position in his organization. He first discussed this job with Complainant in July or August, before he had any official approval for the position (Allen 501). He told her that the position was now approved by his respective vice president (Allen 473). He had not started the internal selection process, but told Complainant that, depending on what happened with her situation with respect to Mr. Moss, she might be interested in applying for the job (Allen 473).

79. The position was located in the Center for Rural Waste Management which was being run by Mr. Malia who, at that time, was on a personal services contract (Allen 475). Mr. Allen suggested that Complainant speak with Mr. Malia regarding the position (Allen 478). He, himself, spoke to Mr. Malia about Complainant. Mr. Malia did not raise any serious concerns about hiring Complainant, but they did discuss her situation with regard to Mr. Moss (Allen 479).

80. Complainant spoke with Mr. Malia regarding the position around November 1, 1993 (Douglas 112). Complainant testified that Mr. Malia indicated that he was somewhat hesitant to consider her for a position in light of the fact that she had filed a complaint with the Department of Labor (Douglas 112-3). She also testified that he indicated that he would discuss the situation with Mr. Allen and get back to her, but he never contacted her regarding the job again (Douglas 113).

81. At some point after the discussion with Mr. Malia, Complainant again spoke to Mr. Allen. Mr. Allen told her that he was no longer able to discuss a position for her at TVA (Douglas 114).

82. In his testimony, Mr. Malia stated that he did not remember saying that he was worried that Mr. Allen was considering Complainant for a job even though she had filed a complaint with the Department of Labor (Malia 898).

83. Complainant never had the opportunity to apply for the position because it was never advertised outside of TVA (Allen 509). The internal selection process did not produce strong candidates, so the decision was made not to hire anyone internally (Allen 509). Additionally, because of monetary constraints created by the new reduced budget, a decision was made to put the hiring decision on hold for six months and reexamine it then (Allen 509). At the time the issue was revisited in February, 1994, a decision was made not to fill any more positions with outside candidates (Allen 510).

84. The position remains unfilled (Allen 510). Although it still exists on paper, as a result of TVA's reorganization, the position will not be continued (Allen 510).

85. Mr. Allen learned that Complainant was suing TVA in late October or early November (Allen 529). Mr. Malia does not recall when he learned that Complainant had filed a complaint (Malia 903).

### **Discussion**

Dr. Margaret Douglas, Complainant, has a B.A. two Masters degrees and a Ph.D. in agriculture economics with a concentration in environmental economics. She was employed by Respondent Tennessee Valley Authority in the period 1990-92 under the supervision of Roosevelt Allen. In June, 1992, she was hired by the City of Knoxville as the manager of the Office of Solid Waste.

Complainant was employed by the City of Knoxville during a prolonged controversy involving a local compost site. As manager of the Office of Solid Waste, Complainant publicly made known her concerns regarding potential environmental and health problems at the site. On July 15, 1993, Complainant was terminated for failing to follow the chain of command regarding the compost controversy. Complainant negotiated a settlement with the City on August 10, 1993, whereby she was reinstated and immediately resigned her position.

On August 3, 1993, Complainant was offered and accepted the position of Manager of Program and Project Appraisals by TVA's Senior Environmentalist Lawrence Moss. On August 6, 1993, Mr. Moss withdrew his offer and, instead suggested a one-year personal services contract for the same position at equivalent compensation (Finding No. 36). In late October, TVA employee Roosevelt Allen discussed with Complainant the possibility of a position as an Environmental Scientist at the Center for Rural Waste Management (Finding No. 78).

Complainant has not been placed in any of these positions. She alleges Respondent TVA has unlawfully refused to employ her because she had engaged in activities protected by the Acts (*See* footnote 1). Respondent argues that Dr. Douglas' complaint was untimely. Furthermore, Respondent argues that Complainant did not engage in protected activities, that if it is found that she did engage in protected activities, that Mr. Zigrossi was not aware that she had engaged in said activities, and that Complainant failed to prove discrimination.

Issues which require resolution include the following:

- I. Was the complaint timely filed.
- II. Is Complainant protected under the applicable whistleblower statutes.
  - A. Did Complainant engage in protected activity.
  - B. If Complainant is found to have engaged in protected activity, was Respondent aware of Complainant's protected activity.
  - C. Did Respondent fail to hire Complaint for a valid nondiscriminatory reason or was this a pretext.
  - D. If Complainant established a *prima facie* case of illegal discrimination, has it been rebutted.
- III. Damages
  - A. Back pay

## B. Compensatory Damages

- IV. Are sanctions appropriate as a result of the failure of TVA's Chairman of the Board Craven Crowell to appear as ordered by the undersigned on September 12, 1994 and for alleged *ex parte* communications.

## **I. Was the complaint timely filed**

In a whistleblower case, the statute of limitations commences running the day that an employee becomes aware, or reasonably should have been aware, that she was discriminated against. Rex v. EBASCO Services, Inc., No. 87-ERA-6, preliminary D&O of ALJ at 4 (Jan. 27, 1987), adopted by SOL (April 13, 1987). The statute requires that the complaint be filed within 30 days of the alleged violation. 29 C.F.R. 24.3(d); CAA, 42 U.S.C. 7622(b)(1); TSCA, 15 U.S.C. 2622(b)(1); CERCLA, 42 U.S.C. 9610(b); SDWA, 42 U.S.C. 300j-9(i)(2)(A); WPCA, 33 U.S.C. 1367(b); and SWDA, 42 U.S.C. 6971(b). A complaint is deemed filed as of the date it was mailed. 29 C.F.R. 3(b); *See also* Sawyers v. Baldwin Union Free School Dist., No. 85-TSC-1, D&O of remand by SOL, slip op. at 5 (Oct. 5, 1988).

Margaret Douglas filed a complaint in this action on October 19, 1993, alleging violations of the CAA, 42 U.S.C. 7622; TSCA, 15 U.S.C. 2622; CERCLA, 42 U.S.C. 9610; SDWA, 42 U.S.C. 300j-9(i); WPCA, 33 U.S.C. 1367; and the SWDA, 42 U.S.C. 6971. An amended complaint was filed on December 9, 1993. Ms. Douglas alleges that Respondent TVA refused to employ her 1) as a regular TVA employee in the position of Manager of its Program and Project Appraisal Program; 2) under a one-year personal services contract and 3) as a regular TVA employee as an Environmental Scientist in its Community Partnership Program.

1) TVA Senior Environmentalist, Lawrence Moss, offered and Complainant accepted the position of Manager of Program and Project Appraisal on August 3, 1993 (Finding No. 30). On August 6, 1993, Mr. Moss contacted Complainant to inform her that there were some concerns at TVA about hiring her due to her controversy with the City (Finding No. 36). He suggested the possibility of a one-year personal services contract for the same position and equivalent compensation (Finding No. 36). Although Dr. Douglas was unhappy about this new proposal, she agreed to accept the contract (Finding No. 36). During the thirty days following August 6, 1993, Complainant took no action to file a complaint based on the withdrawal of Mr. Moss' offer to come on board as a regular, full-time TVA employee. She was not misled or prevented from asserting her rights with regard to this position and she voluntarily agreed to its withdrawal. Therefore, Complainant's cause of action as to the position of Manager of Program and Project Appraisal is untimely filed.

2) The one-year contract position suggested by Mr. Moss entailed essentially the same tasks as the Manager of Program and Project Appraisal position (Finding No. 36). Mr. Moss agreed that compensation would be equivalent to that of the withdrawn job (Finding No. 36). Complainant agreed to accept the contract; however, it was never ratified. On August 11, 1993, five days after

the initial offer, Mr. Moss called Complainant to tell her that his boss, Mr. Zigrossi, was holding up her contract due to her role in the controversy with the City (Finding No. 40). Again, on August 20, Mr. Moss called to tell Complainant that he was still trying to get Mr. Zigrossi to sign the contract and that he would get back to her within a week (Finding No. 41). The following week, on August 27, Mr. Moss left a message informing her that the contract was still being delayed, but that he hoped to have some news by the end of the next week (Finding No. 40). Mr. Moss never called again (Douglas 204).

Complainant's attorney, Mr. Anderson spoke with Mr. Moss sometime after his client executed the settlement with the City (Finding No. 40). Mr. Anderson wanted to ensure that Respondent was aware of the settlement and that the controversy was resolved (Finding No. 46). Mr. Anderson testified that Mr. Moss told him that there were people at TVA who felt that they should wait to hire Complainant until the controversy died down a bit (Finding No. 46; Anderson 400). Mr. Anderson also spoke with Mr. Zigrossi who indicated that eventually TVA would finalize the deal with Complainant, but that he was concerned about TVA's image with the City (Finding No. 47; Anderson 400).

On September 17, 1993, Complainant wrote to Mr. Moss asking him to clarify TVA's position on her contract for personal services (Finding No. 52; CX-9). Complainant requested that Mr. Moss respond to her in writing by September 30, 1993. Mr. Moss did respond to Complainant's request on September 30 (CX-5). He stated, *inter alia*, that "TVA has not yet made a final determination about this matter but will inform you of its decision in the near future." (Finding No. 52; CX-5). Furthermore, On October 22, 1993, three days after the complaint was filed, Mr. Zigrossi, himself, wrote to Complainant and informed her that after he reviewed the Resource Group's employment needs ". . . . I will be in a position to make a decision as to whether TVA will be able to utilize your services, and I will let you know my decision at that time." (Finding No. 54; CX-8).

Respondent argues that . . . "Equitable tolling is inappropriate when plaintiff has consulted counsel during the statutory period. Counsel are presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to [plaintiff]." *citing Hays v. Wells Cargo, Inc.*, 596 F. Supp. 635, 640 (D.Nev., 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986)(*additional citations omitted*). While the legal premise upon which Respondent's arguments are based is valid, the facts of this case reveal that Employer, through statements made by Mr. Moss and Mr. Zigrossi, actively misled Complainant as to the possibility of her employment with TVA. Complainant diligently followed up on her employment prospects with Mr. Moss. She was assured and reassured that he would get back to her shortly with positive news. Complainant's attorney, Mr. Anderson's conversations with Messrs. Moss and Zigrossi were encouraging. In light of those conversations, it did not appear that filing an action against TVA would be in Complainant's best interest if the situation was likely to resolve itself in the near future without resorting to litigation.

However, twenty days after Mr. Moss's last contact with Complainant, Complainant wrote and asked him to define TVA's position with regard to her employment. Mr. Moss responded on September 30, 1993, that TVA had not yet made a final determination and did not say if or when

TVA would be able to execute her contract. As a result of that response, on October 19, 1993, well within 30 days of September 30, Ms. Douglas filed her complaint with the Department of Labor. Even after the October 19, 1993 filing date, Mr. Zigrossi continued to string Complainant along by telling her that after he completed a review of his employment needs he would let her know of his hiring decision. Based upon the facts and circumstances of this case, it is evident that Complainant was unaware of the discrimination until some time after Mr. Moss' letter of September 30. The allegations of the complaint relating to the one-year contract proposal were timely filed.

3) Complainant's initial contact with Respondent after her termination by the City was with Mr. Roosevelt Allen in July, 1993 (Finding No. 75). Mr. Allen mentioned a job that she might be interested in; however, the position had not been posted or even approved at that time (Finding No. 75). Mr. Allen told her that if an internal search for qualified candidates was unsuccessful, he would speak to her again about applying for the position (Finding No. 75). In late October, Mr. Allen spoke with Complainant again about the position of Environmental Scientist at the Center for Rural Waste Management (Finding No. 78). The position was approved, but still not posted internally (Finding No. 78).

The position in question fell under the management of Mr. Jim Malia (Finding No. 79). Complainant spoke to Mr. Malia about the job around November 1, 1993. Mr. Malia told her that he was somewhat hesitant to consider her for the position in light of the fact that she had filed a complaint with the Department of Labor against Respondent TVA (Finding No. 80). At some time after the November 1 conversation with Mr. Malia, Complainant spoke again with Mr. Allen. Mr. Allen told her that he was no longer able to discuss the possibility of a position at TVA with her (Finding No. 81).

Complainant was aware or should have been aware, that she was discriminated against with regard to the position of Environmental Scientist after the November 1, 1993 conversation with Mr. Malia. Mr. Malia specifically stated that he was hesitant to consider Complainant for a position in light of the fact that she had filed a complaint with the Department of Labor. At that point she became aware that she was discriminated against based solely on the fact that she filed a complaint; this is precisely the kind of discriminatory conduct that the whistleblower statutes were enacted to prevent. However, Complainant did not file the amended complaint until December 9, 1993. This is nine days too late under the thirty-day limitation set forth in the statutes. Therefore, Complainant's amended complaint as to the position of Environmental Scientist was untimely filed.

## **II. Is Complainant protected under the applicable whistleblower statutes.**

To invoke the protection of the whistleblower statutes, an employee must show that: 1) he engaged in protected conduct; 2) the employer was aware of said conduct; and 3) the employer took some adverse action against him. The employee must also present evidence to raise the inference that the protected conduct was the likely reason for the adverse action. Dartey v. Zack Company of Chicago, Case No. 82 ERA-2, Secretary's Decision and Final Order (April 25, 1983) slip op. at 5-9.

If the employee establishes a *prima facie* case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate nondiscriminatory reasons. *Id.* If the employer is likewise successful, the burden shifts once again to the employee, who has the opportunity to demonstrate that the reasons proffered by the employer were not the true reasons for the employment decision. In that event, the trier of fact must decide whether the employer's proffered explanation is worthy of credence or whether the discriminatory reason alleged by the complainant was a more likely motivation. *Id.*

The presence or absence of retaliatory motive is a legal conclusion and provable by circumstantial evidence, even if there is evidence to the contrary by witnesses perceiving lack of improper motive. *Id.*

### **The Prima Facie Case**

#### **A. Did Complainant engage in protected activity.**

In June, 1992, Complainant was solicited by Knoxville Public Services Director, Laurens Tullock, to become manager of the City's Office of Solid Waste (Finding No. 5). Complainant agreed. As part of her position, Complainant was responsible for overseeing the City's composting project which was contracted out to CCA (Finding No. 6). On August 24, 1992, Complainant sent a memo to Mr. Tullock advising him that CCA was not in compliance with their contract with the City (Finding No. 8).

Six months later, on February 10, 1993, Complainant sent the first of four memos to her new supervisor, Knoxville's Director of Public Services, Bob Whetsel, advising him of her concerns regarding public health risks as a result of CCA's mulching operation (CX-95). In March, 1993, Complainant became aware that CCA was cited for violations of Section 69-3-108 of the Tennessee Water Quality Control Act. The Act requires compliance with all state and federal laws or regulations. Tenn. Code. Ann. 69-3-108(e)(1)(1994). On April 19, 1993, Complainant sent Mr. Whetsel another memo which specifically stated that CCA had violated air and water quality regulations and that, as a result, she recommended that the City terminate its contract (CX-99).

On June 17, 1993, Complainant learned that, *inter alia*, tests for heavy metals in the area revealed concentrations of lead, cadmium and other toxic metals high enough to require Superfund cleanup (Finding No. 13). CCA was advised to consult with legal counsel regarding its federally mandated reporting requirements under Section 103(c) of CERCLA by Environmental Consulting Engineers, Inc., the firm hired by CCA to test the soil at the site (CX-113). Upon learning of these test results, Complainant sent off yet another memo to Mr. Whetsel. This memo, dated June 16, 1993, reiterated that significant levels of heavy metals including lead, manganese, boron and other metals were found on the CCA composting site. The memo also stated the following:

After meeting with the Mayor, Randy Vineyard, Bud Gilbert, Tim Burchette, and you yesterday, I am concerned about the direction [of] sic the city is taking to deal with the serious health risks raised by the composting operations. I believe that we must discontinue sending our mulch to the Lorraine Street site to diminish our contribution to the problems on Lorraine Street. Due to the positive fecal coliform tests on the compost, we must insist that CCA discontinue the sale of the material.

In my opinion, we should landfill the existing mulch on the Lorraine Street site rather than continue to sell it to the public. I also think that we have an obligation to the public to continue testing the Lorraine Street site for hazardous waste. The state suggested in our meeting today that given the water samples that showed a high metal content in parts of the site, we may be operating a composting facility on a superfund site. If so, then we have a responsibility to make a public disclosure and follow state procedures for containment or remediation. (emphasis added).

It appears to me that the attitudes of Mayor Ashe, Randy Vineyard and you imply that we should not disclose the nature of our problems or that our problems do not really pose a health threat. The fact that we have positive tests on fecal coliform, e. coli, and heavy metals leads me to believe otherwise. I would like to know from you at what point, if ever, do you think it would be necessary for the City to close the current composting operation and notify the public of the health risks. (CX-101).

It is clear from the subject matter of these memos that Complainant engaged in activity protected, at a minimum, under CERCLA and the Safe Drinking Water Act.

**B. If Complainant is found to have engaged in protected activity, was Respondent aware of Complainant's protected activity.**

Complainant acknowledges that Respondent's Chief Administrative Officer, Norman Zigrossi, had final approval of her personal services contract for employment at TVA (RX-8, p.2; Findings No. 40, 42, 62). It is Mr. Zigrossi's uncontradicted testimony that he was aware of the facts and circumstances surrounding Complainant's involvement in the compost controversy only through what he read in the papers. (CX-155, Zigrossi deposition, 58). Mr. Zigrossi testified in his deposition that he receives the Knoxville News-Sentinel newspaper and reads it "Every day, religiously." (Id. at 11-12). The events surrounding the compost controversy were widely covered by the media. Twenty-five News-Sentinel articles related to the controversy, most dated between July 2, and August 25, 1993, have been accepted into evidence (CX-31-57; RX-3). At least six of those articles specifically

reported that Complainant had voiced safety concerns related to the presence of heavy metals in the soil at the compost site (CX 31, 32, 33, 35, 38, 41; RX-3).

In an article dated July 2, 1993 and entitled Tests indicate toxic wastes present at compost firm site, Complainant was quoted as saying she was concerned about ". . . lead, arsenic and barium because those were the metals we found to be the highest over the acceptable levels." (CX-31). She further stated that if CCA's compost is found to be contaminated, it will likely have to be sent to a hazardous waste landfill. Id. The article went on to explain that officials were considering whether they should include the CCA site on the Superfund list. Id. On the front page of the Sunday edition of the Knoxville News-Sentinel, dated July 18, 1993, just three days after Complainant's termination, an article clearly stated that "[E]arlier in July, Douglas had warned the public not to eat vegetables grown in compost purchased from CCA because the compost might be contaminated with fecal coliform bacteria and/or toxic heavy metals." (CX-41).

A person who read the paper "every day religiously" would, of necessity, have taken notice of the large number of articles devoted to one issue - the compost controversy, especially as it involved concerns directly related to his particular line of work. A high percentage of these articles mentioned safety concerns of one kind or another raised by Complainant and a fair amount specifically mentioned her concerns related to high concentrations of toxic metals<sup>3</sup>. It is, therefore, reasonable to conclude that Mr. Zigrossi was aware of Complainant's protected activities<sup>4</sup>, as they were published in a medium he was exposed to and read daily. In fact, his testimony referring to the controversy surrounding Complainant compels the inference that he was aware of her protected activity involved in her dispute with the City.

**C. Respondent took adverse action against Complainant because of her protected activity.**

As soon as Mr. Zigrossi learned that Mr. Moss had extended an offer of full-time, permanent employment to Complainant, he called Mr. Moss to inform him that he had a problem with Complainant and her role in the controversy with the City (Finding No. 32). Mr. Zigrossi expressed concerns about Complainant's technical competence and his perception that the controversy had

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<sup>3</sup>As already discussed (*see* II. A., *supra*), the subject matter of Complainant's statements make it clear that they constitute protected activity under CERCLA.

<sup>4</sup>Respondent's argument that Mr. Zigrossi "did not relate what he had read in the newspaper to 'protected activity' on the part of Complainant" (*see* Respondent's brief at 24 *citing* Zigrossi at 535, 647-8), is irrelevant for purposes of this analysis. The second element of Complainant's *prima facie* case requires that Respondent be aware of the underlying action which constitutes protected activity. It does not require that Respondent equate the action with the concept of protected activity. As Mr. Zigrossi was aware of the statements made by Complainant, which have been found to be protected, he will be found to have been aware of her protected activity for purposes of establishing a *prima facie* case.

created a media event which was "politically explosive" (Finding No. 34). As a result, Mr. Moss withdrew his offer to Complainant on August 6, 1993, three days after it was initially made (Finding No. 36). In its place, Mr. Moss suggested the possibility of a one-year personal services contract for the same position she was originally offered with equivalent compensation (Finding No. 36). Complainant reluctantly agreed (Finding No. 36).

On August 10, 1993, prior to signing her settlement with the City, Complainant attempted to confirm her contract with TVA. She called Mr. Moss from her attorneys' office, but he was not in his office that day. Mr. Moss' secretary, Charlotte Gaylon testified that she informed Complainant that Mr. Moss had no authority to approve the contract unless Mr. Zigrossi signed it and that the final authority rested with him." (Finding No. 38). Complainant contests the claim that Ms. Gaylon told her that the final authority to authorize the contract rested with Mr. Zigrossi (Finding No. 38). However, if his approval was not necessary to the agreement, Mr. Moss could have executed the contract himself. By informing Complainant that Mr. Zigrossi had not yet signed the contract, Ms. Gaylon was, in essence, telling Complainant that his signature was necessary to a binding agreement. In any event, Complainant was aware at the time she executed her settlement with the City that the personal services contract at TVA was not yet executed.

When Mr. Moss returned Complainant's call the next day, he informed her that Mr. Zigrossi was holding up her contract, but predicted a positive outcome in the near future (Finding No. 40). Complainant was aware that the reason Mr. Moss had changed the terms of his original offer of a permanent employment position to a personal services contract was related to her controversy with the City (Finding No. 36; Moss 303). Mr. Moss told her that Mr. Zigrossi was holding up her contract for the same reason (Douglas 204). His statement was corroborated by reports from her attorney, Mr. Anderson, who spoke with both Mr. Moss and Mr. Zigrossi about Complainant's employment status at TVA. Mr. Moss told him that TVA intended to hire Complainant, but wanted to let the compost controversy die down a bit first (Findings No. 46, 47; Anderson 399-400). Anderson also testified that Mr. Zigrossi indicated some concern over TVA's image with the City with regard to this situation. Id.

On August 20, 1993, Mr. Moss called and told Complainant that he was still trying to get Mr. Zigrossi to sign the contract and could get back to her within one week (Finding No. 41). Again, on August 27, Mr. Moss called Complainant and left the following message on her answering machine:

Hi Peggy. It's Larry Moss at TVA. . . . I spoke to Norm. He thinks he should be able to resolve this by the end of next week. He still has to talk to one key person. So I'm still hopeful, but I'm sorry about the delay. I hope to have some news for you by the end of next week. Thanks. Bye. (Finding No. 42).

Mr. Moss did not initiate contact with Complainant again. On September 17, 1993, Complainant sent Mr. Moss a letter requesting him to clarify TVA's position on her contract for personal services (Finding No. 52). In his response dated September 30, 1993, Mr. Moss indicated

that "TVA has not yet made a final determination about this matter but will inform you of its decision in the near future" (Finding No. 52). In an unsolicited letter from Mr. Zigrossi, dated October 22, 1993, he informed Complainant that after a review of his employment needs ". . . I will be in a position to let you know my decision at that time" (Finding No. 54).

From August 3, 1993, the date of Mr. Moss' first offer of employment, until September 30, 1993, the date of Mr. Moss' last correspondence, Complainant had been anticipating a job at TVA. The ultimate authority on whether or not she received that job rested with Norman Zigrossi. Mr. Zigrossi continually put off Mr. Moss' attempts to resolve the issue of Complainant's employment status (Finding No. 44). Mr. Moss testified that he repeatedly asked Mr. Zigrossi whether he was in a position to make a decision over many days and weeks, but that until October 13, 1993, the question of Complainant's employment was still open (Finding No. 45; Zigrossi 640; Moss 310, 325). Mr. Zigrossi, himself, testified that he never did clearly communicate his intent of not hiring Complainant, or anyone, for the position. When he was asked why he did not address the issue with Mr. Moss, Mr. Zigrossi replied "Well, I don't know the reason." (Zigrossi 604; 640).

The weight of the evidence shows that Mr. Zigrossi repeatedly delayed making a decision about Complainant's prospects of working for TVA. The evidence also compels the inference that his procrastination resulted from concern over Complainant's involvement in the compost controversy with the City. Mr. Zigrossi repeatedly refused to address the issue and was irritated with Mr. Moss for continuing to bring it up (Zigrossi 604). It appears that by his inaction, Mr. Zigrossi was hoping that the matter would go away and that he would not have to directly address it himself. However, his inaction, motivated by Complainant's protected activity, was discriminatory and constitutes adverse action against her. Complainant, by showing that her protected activity was the likely cause of the discrimination, has established her *prima facie* case.

#### **D. Rebuttal**

Establishing the *prima facie* case "in effect creates a presumption that the employer unlawfully discriminated against the employee." Respondent now has the burden of producing evidence to rebut the *prima facie* case, namely, that the adverse action was taken for a legitimate nondiscriminatory reason. If Respondent can successfully carry this burden, the presumption drops from the case. Complainant must then show that Respondent's proffered reason was not the true reason for the employment decision and that retaliation for protected activity was the motivating factor. Complainant retains the ultimate burden of demonstrating that he was a victim of improper discrimination. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Respondent asserts that Complainant was not hired for nondiscriminatory business reasons, namely, that Mr. Zigrossi did not want to hire a contract person who was not a part of the organization to come in and establish an organization that someone else would be responsible for; that TVA was turning away from using contract personnel; that there was concern regarding Complainant's managerial competence; and that budget problems prohibited the hiring of anyone, in any capacity, to fill the position.

Mr. Zigrossi testified that he "didn't think it was wise for a contract person who was not a part of the organization to come in and establish an organization that someone else would be hired to run. . . ." (Zigrossi 606). He also took the position that TVA did not need to spend money for an outside consultant to do the things that Mr. Moss could and, in Mr. Zigrossi's opinion, probably should be doing himself (Zigrossi 592). This was in keeping with Mr. Zigrossi's alleged perception that the philosophy of the new Board of Directors was to reduce and possibly eliminate the need for outside contracting (Zigrossi 641, 648). He testified that it was his feeling that the new Board expected work to be done internally; therefore, he refused to approve Complainant's contract (Zigrossi 641).

In addition to his desire not to hire a contract person for a position he felt Mr. Moss should be responsible for, Mr. Zigrossi also expressed concern that Complainant was not competent to handle the position (Finding No. 34). Complainant's assessment center results indicated that she had high analytical skills, but that she had some shortcomings in the management area (Finding No. 29; Zigrossi 579; Moss 289). Mr. Zigrossi also noted that there was some concern over her handling of the controversy with the City. He stated that ". . . one's credibility is at stake [when] (sic) you are in a controversy of this nature and that it goes to the competency of the individual in terms of their professional competency. . . ." (Zigrossi 576). To Mr. Zigrossi, the answer as to whether or not Complainant was competent would be found in whether or not she was technically correct in her dispute with the City (Zigrossi 573). Mr. Zigrossi acknowledged that he was not in a position to resolve that issue. Therefore, he simply decided not to hire Complainant (Zigrossi 580).

In keeping with his testimony that the new Board of Directors desired to reduce and possibly eliminate outside contracting in favor of doing all necessary work internally, Mr. Zigrossi refused to approve Complainant's contract for personal services (Finding No. 63). However, TVA's Policy on Contracting, released in December, 1993, does not support Mr. Zigrossi's alleged perception that the new Board of Directors were philosophically opposed to hiring outside contractors (CX-143). The record supports the finding that Mr. Moss had conducted an unsuccessful search for qualified internal candidates<sup>5</sup>. Based on the established contracting policy, when faced with filling a position which requires expertise not available at TVA, the acceptable course of action would have been to utilize a personal services contract. As Complainant was found to be qualified for the position and she possessed skills in the area of contingent valuation, which were absent inside TVA, a personal services contract would have been an appropriate means, in accordance with TVA policy, of bringing

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<sup>5</sup>In October, 1993, an internal candidate, Juan Gonzales, marginally passed TVA's internal screen and was scheduled to go to the Assessment Center for consideration regarding the Program and Project Appraisal position (Headrick 759-60). Mr. Gonzales was a late applicant for the position (Headrick 759). Jenny Headrick, manager of research and development in TVA's corporate human resources department, became aware that Mr. Gonzales was scheduled to go to the Assessment Center. At that point in time she was also aware that budget was becoming more of an issue in the Resource Group. Therefore, she asked Mr. Zigrossi whether she should continue to process Mr. Gonzales' application (Headrick 761). Mr. Zigrossi informed her that because the budget had not been approved for environmental management at that time, she should cancel the Assessment Center testing scheduled for Mr. Gonzales (Headrick 761).

her on board. Therefore, Mr. Zigrossi's refusal to do so because of his belief that it was not in keeping with TVA policy supports the inference that his articulated rationale was pretextual and his motivation discriminatory.

His refusal to hire a contractor for a position that someone else would be hired to run is likewise pretextual. If Mr. Zigrossi's argument had merit, it would abolish the need for personal service contracts. Furthermore, his argument that Mr. Moss should be performing the tasks assigned to the position he sought to fill with Complainant cannot be supported as Mr. Moss lacked the contingent valuation skills he considered central to the position.

Furthermore, Mr. Zigrossi's concern regarding Complainant's competency is also pretextual. Mr. Zigrossi linked Complainant's competence directly to the compost controversy and whether or not the position she took was, in fact, correct. Mr. Zigrossi felt that "the controversy smacked upon (sic) her technical competency and other competencies, managerial skills, her ability to get along with people, her ability to play on the team, and all of the other things that are involved in management and leadership positions" (Zigrossi 709). Complainant engaged in protected activity (*See* Section B). The fact that controversy ensued as a result of that activity does not necessarily reflect on a person's competence. Controversy is inherent in the whistleblowing process. The overriding concern as to Complainant's competency was linked to the controversy arising out of her environmental concerns. Accordingly, the asserted question as to her competence is pretextual and, thus discriminatory.

Mr. Zigrossi also alleges that Complainant's Assessment Center results indicated weakness in the management area (Zigrossi 579). Mr. Zigrossi took the position that he "didn't need to hire anybody. . . . It was not my position to resolve the issue (of Complainant's competency)." (Zigrossi 580). He had no plan to resolve the issue of her competency, and he, in fact, took no steps to satisfy himself as to her competence (Zigrossi 580). His complete indifference to Complainant's actual ability to do the job at issue supports the inference that Mr. Zigrossi was not, in fact, concerned with her ability to do the proposed job; instead, he relied upon unsubstantiated shortcomings as a reason not to hire her.

If the foregoing reasons had, in fact, been true reasons for refusing to hire Complainant, there would have been no reason for procrastination and Mr. Zigrossi, more likely than not, would have immediately turned Complainant down for a position at TVA. His procrastination and admission that he was influenced by the controversy surrounding Complainant supports the finding that the business reasons he advanced in support of his conduct were nothing more than after-the-fact rationalizations. Mr. Zigrossi's alleged concerns regarding TVA's contracting policies and Complainant's competence appear to be pretext for not hiring her. His articulated rationale has been found not to be the true reason for his employment decision. The facts support the conclusion that the motivating factor behind Mr. Zigrossi's decision was based on Complainant's involvement in a controversy arising out of a protected activity and, therefore, constitutes illegal discrimination.

Although it was not a consideration when discussions about hiring Complainant first began,

as time went on, TVA's budget clearly became a factor in Mr. Zigrossi's refusal to approve her contract (Zigrossi 591). In August of 1993, Mr. Moss proposed a budget of \$5.5 million (Finding No. 67). He, along with all the other vice presidents submitted higher budget requests than were ultimately awarded (Finding No. 68). On October 12, 1993, Mr. Moss was informed that his budget request was cut to \$2.8 million (Finding No. 68). As a result of this budget cut, a number of planned positions, including the position which is the subject of Complainant's suit, were not filled (Finding No. 70). However, had Mr. Zigrossi not procrastinated with regard to hiring Complainant, the budget would not have been an issue. In fact, if he had ratified her contract for personal services, which was ready for signature on August 10, 1993, it is undisputed that the budget would not have been a bar to her employment at TVA (Finding No. 72).

It is evident that TVA's budget concerns became an issue and a valid bar to Complainant's employment under the personal services contract only after Mr. Zigrossi had repeatedly and continually put off addressing the issue of her employment at TVA (Findings No. 44, 72). Had he addressed the employment issue early on in this case, the budget would not have been a prohibitive factor in his hiring decision with regard to Complainant. The reasons for Mr. Zigrossi's delay in addressing this issue were motivated by retaliation for Complainant's protected activity. The budget subsequently provided a fortuitous yet pretextual reason for Mr. Zigrossi to refuse to hire Complainant.

### **III. Relief**

#### **A. Back pay**

As a result of Respondent's unlawful discrimination, Complainant was denied a one-year personal services contract with Respondent in the amount of \$79,000<sup>6</sup> (Finding No. 64). The contract was to have extended from August 16, 1993 through August 15, 1994. There was no guarantee that Complainant's contract would have been renewed or that she would have been offered a full time position with TVA at the conclusion of the contract's term. Therefore, as a result of Respondent's unlawful conduct, Complainant is entitled to relief in the amount of \$79,000, minus any setoff for wages earned by Complainant during the contract period.

Respondent argues that by not following up on inquiries about her interest in employment from several companies that have experienced environmental problems in the past, Complainant failed to mitigate her damages and is therefore barred from making a claim for back pay. Respondent has not presented any evidence to show that Complainant would have received a job offer from one of these companies had she applied for a position. Furthermore, there is no evidence to suggest that the

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<sup>6</sup>Although the record reflects testimony which indicates that Complainant was to be compensated under the personal services contract in an amount equal to the compensation and benefits under the original full-time offer of employment, the request for personal services contract, (RX-5), indicates that the total dollar amount of the contract was limited to \$79,000. Therefore, Complainant will be limited to a maximum recovery of \$79,000.

offer would have been comparable to the one-year personal services contract at TVA.

It is evident that Complainant diligently sought and found employment and did, in fact, mitigate her damages. After her termination with the City, Complainant wrote environmental articles for The Shopper, a local paper, for which she was paid \$1,000 (Douglas 114). In November, 1993, Complainant was awarded a contract with Loudon County in the amount of \$15,000 (Tr. 115). In January, 1994, Complainant was awarded a three-month contract from TIA Solid Waste Consultants in Tampa, Florida, for which she was paid \$6,200 (Douglas 116)<sup>7</sup>. In May, Complainant obtained an associate professor position at Antioch College at a rate of \$36,000 per year. Three months of Complainant's employment at Antioch was performed within the term of the one-year personal services contract. Respondent is entitled to set-off in the aggregate amount of wages earned by Complainant between August 16, 1993, and August 15, 1994, totalling \$31,200.00. As Complainant has been awarded relief in the full amount of the one-year personal services contract minus setoff, she has not suffered a loss of earning capacity.

## **B. Compensatory Damages**

Complainant alleges that she suffered damage to her professional reputation, professional relationships, loss of earning capacity and emotional distress as a result of Respondent's discrimination against her. Complainant requests an award of compensatory damages in the minimum amount of \$1,000,000.00. Compensatory damages are those damages awarded to replace the loss caused by the wrong or injury. Blacks Law Dictionary at 354 (5th ed. 1979). The record does not support a claim for such damages in this case.

In May, 1994, after the events which comprise the record in this case, Complainant successfully obtained a two-year contract for a tenure-track position as an Associate Professor of Environmental Services at Antioch College (Douglas 116). That Antioch College was willing to hire Complainant after the events of the preceding two years demonstrates that she maintained her professional stature as a member of the environmental community.

Throughout her testimony, Complainant named several respected colleagues who supported her during the past several years (Douglas 88, 207, 211; CX-43). The record contains four letters of recommendation on behalf of Complainant dated September 27, 1993, through December 20, 1993; clearly after the majority of acts which comprise this lawsuit took place (CX-121-124). The last letter was dated after Complainant filed this cause of action (CX-124). There is no evidence to suggest that any of those who drafted letters of recommendation for Complainant would not continue to stand behind those letters today. TVA's Team Leader, Jim Malia, thought so highly of

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<sup>7</sup>Complainant requests that the back pay order include the value of moving expenses from Tennessee to Florida and back, from Tennessee to Yellow Springs Ohio, and the legal costs and fees necessitated by custody proceedings so that she could remove her minor children from the State of Tennessee. The record does not provide documentation sufficient to support these claims. Therefore, Complainant's request will be denied.

Complainant that he asked her to be a guest lecturer for his University of Tennessee class in November, 1993 (Douglas 207). The evidence also does not suggest that Mr. Allen, with whom Complainant shares a long history of professional friendship, held her in any less esteem as a result of TVA's actions. Thus, Complainant's claim that she has suffered damage to her professional reputation or relationships is not supported by the record.

Complainant also alleges emotional distress as a result of Respondent's actions. The record reflects that most of the publicity in this case was related to Complainant's dealings with the City. There is no specific evidence in the record as to the impact of TVA's actions on Complainant's mental state. The only evidence which addresses Complainant's emotional state is her own testimony that the compost controversy with the City was difficult for her and that she sought psychological counseling around the time of her first reprimand (Douglas 85). The record does not support the claim for compensatory damages.

#### **IV. Sanctions**

Complainant has requested that sanctions be imposed against Respondent for its failure to produce TVA Chairman Craven Crowell and for alleged *ex parte* communication with the undersigned after the hearing, and that Respondent be required to post for no less than 60 days a copy of the Secretary's decision and order in this matter in all places where notices to employees are routinely placed.

##### **A. Respondent's failure to produce Chairman Crowell**

On the first day of the hearing in this matter, Complainant's counsel requested that Craven Crowell be called to testify as to "his dissatisfaction as he has expressed on the record with Mr. Moss' performance in view of the chairman's stated environmental goals for the agency and the current state of the budget" (Tr. 9). Counsel for Respondent objected. The undersigned ruled that Complainant would be permitted to call Dr. Crowell to testify "to the limited issue of his views as to Mr. Moss" and also the substance of any contacts between Mr. Crowell and Mr. Zigrossi pertaining to Mr. Moss (Tr. 11; 883).

On the second day of the hearing, Counsel for Respondent indicated that Chairman Crowell would not appear at the hearing (Tr. 271). Respondent argued that because Mr. Crowell previously made himself available for deposition, answered all of Complainant's questions and stayed as long as she wanted, that he had nothing to add to the hearing and declined to appear (Tr. 271). In addition, Respondent argues that agency heads such as Chairman Crowell are not required to give testimony "unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice." Respondent's Brief in Opposition to Complainant's Motion, *citing* Wirtz v. Local 30, International Union of Operating Engrs, 34 F.R.D. 13, 14 (S.D.N.Y. 1963); *additional citations omitted*.

The trier of fact and not Respondent is charged with determining whether a party's presence is necessary to the resolution of a particular matter. The order of the undersigned clearly indicates

that Mr. Crowell's testimony with regard to Mr. Moss was found to be relevant and necessary to a determination in this matter. Thus, Respondent's opinion that Chairman Crowell had nothing to add to the hearing is irrelevant and does not excuse him from failing to appear. Furthermore, Respondent's argument that he appeared for a deposition does not excuse him from obeying an order by the court to appear at the hearing. Moreover, Chairman Crowell's appearance at the deposition waives any right he may or may not have had to argue he was exempt from appearing at the hearing.

Respondent refused to produce Mr. Crowell at the hearing in response to the order to appear. Accordingly, adverse inferences are justified. As a result, Mr. Moss' testimony is found credible and TVA is precluded from litigating the credibility of this witness<sup>8</sup>.

### **B. Ex Parte Communication**

Complainant alleges that Respondent engaged in *ex parte* communication in the form of a letter delivered by hand to the undersigned on September 16, 1994. This letter indicated on its face that a copy was being contemporaneously sent to both of Complainant's counsel of record, Ms. de Haven and Ms. Kittrell. By Ms. de Haven and Ms. Kittrell's response dated September 19, 1994, it is evident that they received Respondent's letter. Thus, the communication was not *ex parte* and no sanctions are warranted.

Complainant's request that the Secretary's decision in the case be posted is hereby denied.

### **RECOMMENDED ORDER**

1. Complainant's cause of action as to the position of Manager of Sustainable Development is dismissed as untimely.

2. Complainant's cause of action as to the Environmental Scientist position is dismissed as untimely.

3. Respondent shall pay Complainant for a one year period, representing the length of the personal services contract which was intended to begin on August 16, 1993, and continuing for a period of one year, ending on August 15, 1994. The back pay award, in the amount of \$79,000, shall be set-off in the amount of \$31,200.00, representing Complainant's earnings during that time.

4. Adverse inferences are drawn from the non-appearance of Chairman Crowell at the

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<sup>8</sup>Nothing in the record casts doubt as to the credibility of Mr. Moss. Therefore, even without the issue of sanctions in this case, Mr. Moss' testimony would be found to be credible.

hearing. As a result of such adverse inferences, Mr. Moss' testimony is found credible and TVA is precluded from raising as a defense any argument as to Mr. Moss' credibility.

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THEODOR P. von BRAND  
Administrative Law Judge

TPvB/LMF

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).